No. 94-[illegible]

In The

Supreme Court of the United States

October Term, 1994

GEORGE W. HEINTZ
BOWMAN, HEINTZ, BOSCIA & McPHEE,

Petitioners,

v.

DARLENE JENKINS,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Respondent ("Ms. Jenkins") sued Petitioners (collectively, "Attorney Heintz") under the Fair Debt Collection Practices Act ("FDCPA" or "the Act"), 15 U.S.C. §§ 1692-1692o, claiming that Attorney Heintz engaged in intentional debt padding, in violation of the explicit prohibitions of § 1692e(2) (misrepresentation of the character, amount or legal status of the debt) and § 1692f(1) (collecting an amount not expressly authorized by contract or law).

The principal purpose of the FDCPA is to protect a consumer from direct or indirect collection abuse, including false, deceptive, or unfair collection methods such as the debt padding in which Attorney Heintz engaged here. Congress recognized the

> universal agreement among scholars, law enforcement officials, and even debt collectors that the number of persons who willfully refuse to pay just debts is miniscule [sic]. . . . [T]he vast majority of consumers who obtain credit fully intend to repay their debts. When default occurs, it is nearly always due to an unforeseen event such as unemployment, overextension, serious illness, or marital difficulties or divorce.

S. Rep. No. 382, 95th Cong., 1st Sess. 3 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1697.

> The [Consumer Credit Protection] Act is remedial in nature, designed to remedy what Congressional hearings revealed to be unscrupulous and predatory creditor practices throughout the nation. Since the statute is remedial in nature, its terms must be construed in liberal fashion if the underlying Congressional purpose is to be effectuated.

N.C. Freed Co. v. Board of Governors, 473 F.2d 1210, 1214 (2d Cir.), *cert. denied*, 414 U.S. 827 (1973); *accord Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22, 27 (2d Cir. 1989) ("Congress painted with a broad brush in the FDCPA to protect consumers from abusive and deceptive debt collection practices, and courts are not at liberty to excuse violations where the language of the statute clearly comprehends them . . . ").

In addition to "eliminating abusive debt collection practices by debt collectors," the FDCPA seeks to "ensure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." 15 U.S.C. § 1692(e). Nearly a decade after its adoption of the FDCPA, Congress repealed the original attorney exemption, partly because lawyers were "tout[ing] the[ir] exemption" and implying that they could engage in conduct prohibited to collection agencies. H.R. Rep. No. 405, 99th Cong., 2d Sess. 5 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1752, 1756.

The FDCPA prohibits oppressive, abusive, deceptive or unfair collection tactics by prohibiting certain conduct and by requiring that the consumer be given specific information. It limits the debt collector's communications with third parties and with the consumer under certain circumstances. 15 U.S.C. § 1692c. It forbids debt collectors to engage in other harassing or abusive debt collection techniques, § 1692d, and prohibits debt collectors from using false or misleading representations in connection with the collection of a debt. § 1692e. The FDCPA proscribes the use of "unfair or unconscionable" debt collection practices, including debt padding or collecting more than the amount authorized by the agreement creating the debt. § 1692f. The Act further requires the debt collector to verify a debt upon written notice that the consumer disputes it. § 1692g.[1]

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[1] Attorney Heintz focuses on the FDCPA prohibitions against oppressive, abusive, deceptive, or unfair collection tactics, such as the debt padding involved in this case. However, the Act includes apparently innocuous, but prophylactic,

The Act relies on and encourages consumers, such as Ms. Jenkins, to act as private attorneys general to enforce the public policies expressed therein. 15 U.S.C. § 1692k(a). Indeed, Congress stated its unequivocal intent "that private enforcement actions would be the primary enforcement tool of the Act." *Baker v. G.C. Servs. Corp.*, 677 F.2d 775, 780-81 (9th Cir. 1982).

There is no liability under the Act for any unintentional bona fide errors, if they occur despite procedures to avoid the error. § 1692k(c). Debt collectors who violate the FDCPA are liable for the actual damages caused by the violation, such additional damages (up to $1,000) as the court may allow after considering such factors as whether the violation was frequent or intentional, and the consumer's attorney fees. § 1692k.

The FDCPA defines "debt collector" to mean "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15

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provisions as well. For instance, the FDCPA requires a "mini-Miranda" warning in all communications: "This is an effort to collect a debt, and any information obtained will be used for that purpose." 15 U.S.C. § 1692e(11). Before enactment of the FDCPA, collectors would, for example, extract information about the consumer (unlisted telephone number, bank account number) from responses to a postcard deceptively stating that providing the information would result in the receipt of something of value. *E.g., National Clearance Bureau v. FTC*, 255 F.2d 102 (3d Cir. 1958); *Silverman v. FTC*, 145 F.2d 751 (9th Cir. 1944); *see generally* 3 Trade Reg. Rep. (CCH) ¶ 7825.901.

U.S.C. § 1692a(6). A "debt" is any alleged obligation of a consumer to pay money, "whether or not reduced to judgment." 15 U.S.C. § 1692a(5).

When Congress first enacted the FDCPA, the definition of "debt collector" contained an exclusion for "any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client." Pub. L. 95-109, § 803(6)(F), 91 Stat. 874 (Sept. 20, 1977). In 1986, upon its determination that "consumers should not be stripped of an important protection solely because the collector happens to have a law degree," Congress repealed the FDCPA's attorney exemption, without enacting a replacement. Pub. L. 99-361, 100 Stat. 768 (July 9, 1986); H.R. Rep. No. 405, 99th Cong., 1st Sess. 7 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1752 at 1754.

Ms. Jenkins' amended complaint alleged that Attorney Heintz regularly collects consumer debts (thus meeting the definition of "debt collector"), and in so doing, systematically added amounts for collateral protection insurance to consumers' debts, knowing that such amounts were not authorized by contract or law. Pet. for Cert., App. 15. Attorney Heintz had actual knowledge of the true nature of the insurance imposed by the creditor client by April 1992. Am. Cmplt. ¶ 8. Over the last few years, Attorney Heintz's firm filed many collection actions in which the amount claimed included sums added by the creditor, after the inception of the contract, purportedly for insurance against loss or damage to the collateral. Am. Cmplt. ¶ 20. Most suits resulted in default judgments or agreements by the customer to pay on some basis, undoubtedly made without knowledge of the true nature of the "insurance" charges. *Id.*

Attorney Heintz moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), on the basis that an attorney is not within the definition of "debt collector" when engaged in "purely legal activities." J.A. 15. Discovery was stayed. J.A. 3. The district court granted the motion to dismiss. It recognized that "the FDCPA covers actions by attorneys who engage in the typical debt collecting activities proscribed by the Act," but found that the attorney's letter was not abusive, threatening, harassing or intimidating. J.A. 31. On appeal, the Seventh Circuit reversed, finding that "the Act reaches lawyers engaged in litigation." *Id.* at 38. "Knowingly making unauthorized charges in connection with debt collection is at least deceptive and misleading." *Id.* at 39.

This Court granted certiorari to determine whether the FDCPA's definition of "debt collector" applies to attorneys engaged solely in litigation.

SUMMARY OF ARGUMENT

An attorney who "regularly collects or attempts to collect" consumer debts on behalf of others is a "debt collector" under the plain language of the FDCPA. 15 U.S.C. § 1692a(6). When first enacted in 1977, the FDCPA's definition of "debt collector" included an exception for an attorney-at-law collecting "as an attorney" for a client. Pub. L. 95-109 § 803(6)(F). In 1986, however, Congress repealed that exemption after considering and rejecting the arguments advocated by Attorney Heintz and the Amici in this Court. Pub. L. 99-361, 100 Stat. 768 (July 9, 1986). The Act now contains no exemption for

attorneys, whether collecting debts through litigation or otherwise. Indeed, the FDCPA applied to litigation activities even before the repeal of the attorney exemption. Attorney Heintz's arguments that the definition of debt collector should be construed to exempt attorneys from the standards and requirements imposed by the FDCPA misread the provisions of the statute. Moreover, Attorney Heintz's contentions are contrary to Congress' express intent that attorneys who do not comply with the minimal standards set for debt collectors should face the same liability as nonattorney debt collectors.

ARGUMENT

In this Court, for the first time, Attorney Heintz concedes that he acts as a "debt collector" because his debt collection activities do not solely involve litigation. Pet. Brief at 11. Thus, the facts of this case do not support the question presented: "Whether an attorney engaged solely to prosecute litigation against a consumer is a 'debt collector' within the meaning of the Fair Debt Collection Practices Act (15 U.S.C. § 1692a(6))." Instead Attorney Heintz raises a distinct question, namely, whether the substantive provisions of the FDCPA apply to litigation-related activities of an attorney who is admittedly a "debt collector" under the statutory definition.

The facts of this case do not present the question which is created by the split in the circuits and for which review was granted, nor is it "fairly included therein."[2]

[2] There is no split among the circuits on the issue actually presented on the facts of this case. In *Green v. Hocking*, 9 F.3d 18,

See Sup. Ct. Rule 14(a); *Yee v. City of Escondido*, 112 S. Ct. 1522, 1533 (1992). Instead of the issue of who meets the definition of "debt collector" under the FDCPA, Attorney Heintz's argument concerns what activities are subject to the Act. There is a "heavy presumption" against the Court considering the separate issue presented on the facts of this case, and the exceptional circumstances necessary to overcome that presumption are not present here. *See id.* at 1532-34. For this reason, the Court should dismiss the petition.

If, however, the Court decides to address the merits, it should affirm the Seventh Circuit's decision because it is in accord with the plain language of the statute and the legislative history, as we discuss below.

I. THE PLAIN LANGUAGE OF THE FDCPA, AFTER UNQUALIFIED REPEAL OF THE ATTORNEY-AT-LAW EXEMPTION, IS UNAMBIGUOUS: AN ATTORNEY WHO REGULARLY COLLECTS CONSUMER DEBTS IS A "DEBT COLLECTOR"

A. The Definition of "Debt Collector" on its Face Plainly Includes Attorneys

The term "debt collector" is as broad as it can be, since it includes any person who – even indirectly – tries to collect a consumer debt assertedly owed to another. 15 U.S.C. § 1692a(6). "Any" contains no hint of an exception. *Hutto v. Finney*, 437 U.S. 678, 694 (1978); *Brooks v. United States*, 337 U.S. 49, 51 (1949).

An attorney who files a suit against a consumer debtor to recover a delinquent amount, as Attorney Heintz admittedly did, is a person directly attempting to collect a debt. Litigation is one of a variety of methods through which debts are collected. *Keokuk & Hamilton Bridge Co. v. Salm*, 258 U.S. 122, 125 (1922); *Babbitt v. Dutcher*, 216 U.S. 102, 111 (1910).

Attorney Heintz's claim that "litigation" and "debt collection" are mutually exclusive cannot be reconciled with the ordinary use of these terms. Nothing in the FDCPA suggests a dichotomy between litigation and debt collection.[3] While the FDCPA does not define "collect," the common meaning of the term includes reducing a claim to judgment and enforcing it against the assets or

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19 (6th Cir. 1993) (per curiam), the attorney did not concede that he was a debt collector. The decision stressed that his "general practice consists solely of filing lawsuits for the collection of debts." The Sixth Circuit apparently would agree that an attorney, like Attorney Heintz, who is not solely engaged in litigation is subject to the FDCPA. 9 F.3d at 20 n.3.

[3] Indeed, Attorney Heintz's argument, in the opening brief at 8-9, that attorneys are not debt collectors is a reversal of the bar's historical position that only attorneys could be debt collectors. When collection agencies first arose, attorneys unsuccessfully contended that the agencies were engaged in the unauthorized practice of law, and that only attorneys could collect a debt. *E.g., Missouri ex rel. McKittrick v. C.S. Dudley & Co.*, 102 S.W.2d 895 (Mo.) (writing or calling to seek payment is merely acting as agent for creditor and is not unauthorized practice of law), *cert. denied*, 302 U.S. 693 (1937); *National Revenue Corp. v. Violet*, 807 F.2d 285 (1st Cir. 1986) (statute limiting debt collection to licensed attorneys unconstitutional). *Cf. J.H. Marshall & Assoc. v. Burleson*, 313 A.2d 587, 594-99 (D.C. 1973) (certain court-related aspects of debt collection involve the practice of law). *See generally* A.L. Schwartz, *Operations of Collection Agency as Unauthorized Practice of Law*, 27 A.L.R.3d 1152, 1156 (1969).

income of the debtor. "To collect a debt or claim is to obtain payment or liquidation of it, either by personal solicitation or legal proceedings." *Black's Law Dictionary* 263 (6th ed. 1990). "Absent contrary indications, Congress intends to adopt the common law definition of statutory terms." *United States v. Shabani*, 115 S. Ct. 382, 384 (1994).

Because the plain language of the FDCPA's broad definition includes attorneys, Congress initially enacted a limited exemption for an attorney-at-law collecting a debt "as an attorney" for a client. Pub. L. 95-109 § 803(6)(F). Admittedly, the initial exemption for an attorney acting "as an attorney" chiefly exempted litigation activities, since it has long been established that attorneys "do not 'act as lawyers' when not primarily engaged in legal activities." *Zenith Radio Corp. v. Radio Corp. of America*, 121 F. Supp. 792, 794 (D. Del. 1954) (patent lawyers).

> Attorney at law. Person admitted to practice law in his respective state and authorized to perform both civil and criminal legal functions for clients, including drafting of legal documents, giving of legal advice, and representing such before courts, administrative agencies, boards, etc.

Black's, supra, at 128. The practice of law:

> is not limited to appearing in court, or advising and performing of services in the conduct of the various shapes of litigation, but embraces the preparation of pleadings, and other papers incident to actions and special proceedings, and in larger sense includes legal advice and counsel and preparation of legal instruments by which legal rights or obligations are established.

Id. at 1172. Thus, when Congress exempted "any attorney-at-law collecting a debt as an attorney," the exclusion applied primarily to attorneys engaged in court-related collection activities.[4] The blanket repeal of that exemption accomplishes exactly what Congress intended. Litigation activities of an attorney are now subject to the FDCPA.

With the exception of the Sixth Circuit's per curiam opinion, every appeals court which has considered the issue agrees with the Seventh Circuit in this case, that attorneys engaged in litigation are subject to the FDCPA, based on the plain language of the statute. *Paulemon v. Tobin*, 30 F.3d 307, 310 (2d Cir. 1994) ("[W]e are skeptical that a litigation exemption exists in light of the plain statutory language of the FDCPA"); *Fox v. Citicorp Credit Services, Inc.*, 15 F.3d 1507, 1512 (9th Cir. 1994) ("The plain language of the statute unambiguously precludes any doctrine of special treatment for attorneys under the FDCPA"); *Scott v. Jones*, 964 F.2d 314, 318 (4th Cir. 1992) ("[T]he statutory definition of 'debt collector' is sufficiently clear to avoid recourse to the legislative history of the statute"); *Shapiro & Meinhold v. Zartman*, 823 P.2d 120, 125 (Colo. 1992) ("Rather than restricting the attorney

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[4] Before the repeal, an attorney collecting a debt through nonlitigation activities was within the FDCPA. *FTC v. Shaffner*, 626 F.2d 32, 36 (7th Cir. 1980) (distinguishing between lawyer practicing law, and acting in another capacity); *XYZ Law Firm v. FTC*, 525 F. Supp. 1235 (N.D. Ga. 1981) (no shield for debt collector simply because office operated by attorney). In addition, an attorney who allowed a creditor to use his or her letterhead without personal involvement was subject to liability under the FDCPA. § 1692j.

exception to those attorneys whose debt collection practices are limited to legal activities, Congress deleted the exception altogether").[5]

The only decision that departs from this analysis is *Green v. Hocking*, 9 F.3d 18 (6th Cir. 1993) (per curiam), which involved an attorney who had filed some 2,000 consumer collection cases. One consumer caught him padding the debt by claiming eighteen per cent interest rather than the contractual five per cent. One can infer that this debt padding happened more than once, whether due to use of form complaints, or an intentional effort to increase recovery for the attorney and the creditor. Because Mr. Hocking's law practice, unlike Attorney Heintz's, was limited to litigation, the Sixth Circuit ruled that he was exempt from the FDCPA.[6]

Under *Green*, 9 F.3d at 20 n.3, postjudgment efforts to collect an inflated judgment would be within the FDCPA. If enforcing an excessive judgment is within the FDCPA, surely litigating to get such a judgment should be as well.

A private attorney who performs collection services for the United States Government is subject to the

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[5] Petitioners cite *dicta* in *National Union Fire Ins. Co. v. Hartel*, 741 F. Supp. 1139 (S.D.N.Y. 1990), *Firemen's Ins. Co. v. Keating*, 753 F. Supp. 1137 (S.D.N.Y. 1990), and *Concord Assets Finance Corp. v. Radebaugh*, 172 A.D.2d 446, 568 N.Y.S.2d 950 (1991). Those commercial collection cases are not subject to the FDCPA in any event.

[6] According to *Green*, an attorney is now a "debt collector" within the FDCPA for venue, prelitigation, and postlitigation activities, but is not a "debt collector" for any other purpose. Thus, in the view of the Sixth Circuit, the defined term "debt collector" has different meanings depending on context.

FDCPA, notwithstanding any exemption. 31 U.S.C. § 3718(b)(6). There is no reason to allow a private attorney who collects for a private creditor to engage in activities that the FDCPA prohibits.

B. The FDCPA Has Always Applied to Litigation

Attorney Heintz's argument that the language of the FDCPA supports his claim rests on the premise that "[t]here is a world of difference" between "true debt collectors" and attorneys who collect debts through litigation. Petitioners' Brief at 10. As a matter of fact and law, however, there is no such bright line. In some states, nonattorney debt collectors can file lawsuits to collect debts in the same manner as attorneys and, thus, use both litigation and nonlitigation activities to collect debts. *See, e.g., Martinez v. Albuquerque Collection Serv., Inc.*, No. CIV 93-1468 JB, 1994 WL 622231 (D.N.M. Oct. 14, 1994); *Cruz v. Lusk Collection Agency*, 580 P.2d 1210 (Ariz. App. 1978); *Messmer v. Carter*, 578 P.2d 788 (Or. 1978); Cal. Civil Code § 1788.15 (West 1985); Fla. Stat. Ann. § 559.715 (Supp. 1995); Pa. Stat. Ann. tit. 18 ch. 73 § 7311(b) (Supp. 1994); Wyo. Stat. § 33-11-114 (1987). Nonattorney debt collectors are plainly subject to the FDCPA whether or not they have initiated litigation to collect the debt. With the 1986 amendment, Congress provided that attorneys regularly engaged in collecting debts through litigation are subject to the same requirements as nonattorneys.

Attorney Heintz's argument that litigation does not fall within the FDCPA's conception of "collection of a debt," Petitioners' Brief at 9, is foreclosed by the fact that, from its inception, the FDCPA has directly applied to

litigation activities. For example, in *Kimber v. Federal Financial Corp.*, 668 F. Supp. 1480, 1487 (M.D. Ala. 1987), a collection agency violated § 1692f (unfair or unconscionable practices) by filing a time-barred suit. Similarly, in *Kolker v. Duke City Collection Agency*, 750 F. Supp. 468 (D.N.M. 1990), a collection agency violated the FDCPA by filing collection litigation in contravention of state law restraints on unauthorized practice of law.

Indeed, the FDCPA contains several provisions which would be superfluous if litigation activities were exempt from the coverage of the FDCPA:

1. The FDCPA regulates the venue of legal actions. 15 U.S.C. § 1692i. Attorney Heintz and the Amici concede that the venue provision applies to attorneys. They do not, however, explain why the defined term "debt collector" has a meaning which includes attorneys in the venue provision, but does not have the same meaning elsewhere in the FDCPA. *Cf. Brown v. Gardner*, 115 S. Ct. 552, 555 (1994).

2. The FDCPA exempts from the definition of "debt collector" persons "attempting to serve legal process on any other person in connection with the judicial enforcement of any debt." § 1692a(6)(D). If there were a blanket exemption for all litigation activities, this provision would be unnecessary.

3. The FDCPA permits third party communications which are "reasonably necessary to effectuate a postjudgment judicial remedy." 15 U.S.C. § 1692c(b).

4. The FDCPA prohibits misrepresenting that legal process is not legal process or does not require action by

the consumer. 15 U.S.C. § 1692e(15). A common consumer complaint is that collection agencies would tell them that they did not have to appear in court even though nonappearance would result in a default or a judgment. The provision relates directly to litigation practices.

5. The FDCPA prohibits threats of garnishment or attachment of wages or other property, "unless such action is lawful and the debt collector or creditor intends to take such action." § 1692e(4). Normally, a judgment is a precondition to garnishment or attachment.

6. The FDCPA requires verification of a demand to pay a judgment. § 1692g.

7. The FDCPA precludes a debt collector from using the consumer's failure to dispute a debt "as an admission of liability" in any court. § 1692g(c).

Other FDCPA sections, while not directly addressing litigation, relate to misconduct by collection agencies or attorneys which could occur in association with litigation:

1. § 1692e(2)(A), misrepresenting the character, amount or legal status of any debt, such as suing beyond the statute of limitations, *Kimber*, 668 F. Supp. 1480;

2. § 1692e(2)(B), filing complaint seeking lawyer's fees when none are due, *Strange v. Wexler*, 796 F. Supp. 1117 (N.D. Ill. 1992);

3. § 1692e(9), sending a communication which seems to come from a court but does not, *Tolentino v. Friedman*, 833 F. Supp. 697, 701 (N.D. Ill. 1993);

4. § 1692e(13), falsely representing that documents are legal process;

5. § 1692f(1), collecting an amount not expressly authorized by the contract or permitted by law;

6. § 1692f (6), taking nonjudicial action to dispossess property.

All the provisions which relate directly to litigation activities would be largely meaningless if, as Attorney Heintz claims, litigation does not constitute "collection of a debt" under the Act. "Congress is not to be presumed to have used words for no purpose. . . . [T]he admitted rules of statutory construction declare that a legislature is presumed to have used no superfluous words." *Platt v. Union Pac. R.R. Co.*, 99 U.S. 48, 58 (1878).

Even when attorneys were exempt from the definition of "debt collector," the FDCPA applied to litigation by nonattorney debt collectors. Congress repealed this exemption in 1986 to ensure that attorneys would no longer be able to claim the exempt status that Attorney Heintz claims here.

II. THE LEGISLATIVE HISTORY CONFIRMS THE PLAIN LANGUAGE OF THE FDCPA

Congress' across-the-board repeal of the attorney exemption is unambiguous. The repeal of the limited exemption for an attorney acting as an attorney (conducting purely legal activities) unequivocally demonstrates that attorneys conducting litigation must comply with the FDCPA. There is no need to go beyond the plain language

of the FDCPA; by virtue of the repeal, the Act unambiguously includes attorneys regularly engaged in litigation activities.[7] *Cf. Brown v. Gardner*, 115 S. Ct. at 555.

The legislative history, however, confirms the plain language of the Act. Congress recognized that both collection agencies and attorneys engaged in certain abuses:

> These abuses, all prohibited by the Act, but inapplicable due to the attorney exemption, included . . . threats of legal action on small debts where there is little likelihood that legal action will be taken, simulation of legal process, . . . threats of seizure, and attachment and sale of property where there is little likelihood that such action will be taken.

H.R. Rep. No. 405, 99th Cong., 2d Sess. 4 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1752, 1755. Therefore, "[t]he Committee intends that attorneys in the business of collecting debts be subject to all provisions of the Act, if they meet the definition of debt collector contained in [§ 1692a(6)]. *Distinctions between attorney debt collectors and lay debt collectors are eliminated. . . . " Id.* at 3, *reprinted in* 1986 U.S.C.C.A.N. at 1754 (emphasis added).

As we show below, in repealing the exemption, Congress considered and rejected the arguments now urged

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[7] Sporadic collection efforts are not within the FDCPA, but "any attorney who engages in collection activities more than a handful of times per year must comply with the" FDCPA. *Crossley v. Lieberman*, 868 F.2d 566, 569 (3d Cir. 1989) (quoting Robert Hobbs, *Attorneys Must Now Comply with the Fair Debt Collection Law*, X Pa. J.L. Rptr., No. 46, 3 (Nov. 21, 1987)). *See generally* 1986 U.S.C.C.A.N. 1752.

on this Court by Attorney Heintz: that existing mechanisms for curbing lawyers' misbehavior are adequate and that application of the FDCPA to litigation would be burdensome.

A. House Debate

Both supporters and opponents of the 1986 amendment took the position that the amendment would apply to lawyers "who collect on an occasional basis" and "the small law firm which collects debts incidentally to the general practice of law." 131 Cong. Rec. H10534-10536 (daily ed. Dec. 2, 1985) (remarks of Reps. Annunzio and Hiler).

> H.R. 237 is a fairness bill. It makes certain that all debt collectors operate under the same set of rules, a set of rules which debt collectors themselves have testified are easy to follow and do not restrict the business of ethical debt collectors. . . .
>
> It turns out that rather than a few complaints, the FTC has received some 1,400 complaints about lawyer-collectors. Thus, it is not just the lawyer collection firms that are causing problems but also lawyers who collect on an occasional basis. . . .
>
> I should also point out that what we are asking lawyers to do is not very complicated. We only want them to operate in an ethical way. Any lawyer who can't follow the few simple guidelines in the act, should not have a license to practice law. . . .
>
> We should go on record that we do not set lower standards of conduct for lawyers than we do for other businesses.

131 Cong. Rec. at H10535 (remarks of Rep. Annunzio).

Congressman Hiler opposed the blanket repeal of the attorney exemption with the same arguments as are being made to this Court – that litigation activities would be adversely affected:

> The Federal Trade Commission has maintained that subjection to the FDCPA would create practical problems for attorneys collecting debts as attorneys-at-law. In particular, they have indicated that the application of sections 804 [§ 1692b], 805(b) [§ 1692c(b)], 805(c) [§ 1692c(c)], and 809 [§ 1692g] to such attorneys would inhibit their ability to effectively represent a client. For example, if attorneys are subject to sections 804 and 805(b), their ability to contact third parties in order to facilitate settlements will be severely limited. In addition, the application of section 809, which deals with the validation of debts, could very easily interfere with a client's right to pursue judicial remedies.
>
> The American Bar Association and Commercial Law League of America also have expressed concern with the potential effects of certain provisions of the FDCPA on the practice of law as it relates to debt collection.

131 Cong. Rec. at H10535. Congressman Hiler's arguments did not prevail.

B. House Report

The House Report also supports the position that the 1986 amendment intended to provide "that *any* attorney who collects debts on behalf of a client shall be subject to the provisions of" the FDCPA. H.R. Rep. No. 405, *supra*, at 7, *reprinted in* 1986 U.S.C.C.A.N. at 1758 (emphasis added).

The application of several provisions of the Act to attorneys collecting debts are worthy of note. The restrictions of sections 804 and 805(b) [§§ 1692b and 1692c(b)] on contacts with third parties regarding a consumer's debt are intended to protect the privacy of consumers' financial affairs. These contacts are not legitimate collection practices and result in serious invasions of privacy, as well as the loss of jobs. *The Committee discerns no reason to make any distinction based upon the identity of the debt collector.*

Section 805(c) [§ 1692c(c)] of the Act requires that a debt collector cease communication with a debtor when the debtor so requests. The provision is a means by which the consumer can end what he or she considers harassment and *bring the matter of the debt to a head.* Like the proscription on third party contacts, *the Committee finds no reason to permit attorneys to engage in conduct prohibited lay debt collectors.*

> Requiring the validation of debts under section 809 [§ 1692g] "protects people who do not owe money at all." . . . *Attorneys, no less than lay collectors, can make errors* in cases involving common names or similar addresses. *Consumers should not be stripped of an important protection solely because the collector happens to have a law degree.*

H.R. Rep. No. 405, *supra* at 3, *reprinted in* 1986 U.S.C.C.A.N. at 1753-54 (emphasis added).

Congress considered and rejected the arguments made in this Court by Attorney Heintz. Congress expressly found "that current law does not adequately protect consumers from attorney debt collection abuses

and that repeal of the attorney exemption to the Fair Debt Collection Practices Act is an appropriate way to reduce the amount of this abuse," *id.* at 7, *reprinted in* 1986 U.S.C.C.A.N. at 1758, just as it rejected the original argument that existing laws rendered adoption of the FDCPA unnecessary. 15 U.S.C. § 1692(b). Specifically, Congress found that "[c]learly, bar associations have failed to fulfill their obligations underlying the premise of the attorney exemption [from the FDCPA]. There is no indication that this is about to change. Having undermined the basis for the exemption, attorneys cannot complain about being brought under the Act." *Id.* at 7, *reprinted in* 1986 U.S.C.C.A.N. at 1757. *See also* Congressman Annunzio's statement on the floor of Congress:

> There are those who claim that H.R. 237 is unnecessary because attorney violations are rare and can be handled on a case-by-case basis by State and local bar associations. Unfortunately, the record does not bear this out. As early as 1968, the New York City Bar Association noted:
>
> > The staggering increase in recent years in installment and other credit sales has had a profound affect on that segment of the bar involved in collection work. The demand of volume threatens to destroy all vestiges of professionalism. The problem is too extensive to be remedied on a case-by-case basis.

131 Cong. Rec. at H10535.

Congressional hearings on the proposal to delete the attorney exemption were held on January 31, 1984, and October 22, 1985. At the 1985 hearing, a representative of the collection industry testified:

> The FTC seems to believe, as you and we do, that attorney collectors should be treated the same as third party collectors. But then the Commission seems to elevate an elite, unidentified group of attorneys above the law and claims they should be exempt from the consumer protection provided by the FDCPA. We don't follow that logic. Either you are or you are not collecting a debt for another person.

Hearing To Amend the FDCPA Before the Subcomm. on Consumer Affairs and Coinage of the House Comm. on Banking, Finance and Urban Affairs, H.R. 237, 99th Cong. 1st Sess. 113 (statement of Walter E. Kurth, President, Associated Credit Bureaus, Inc.).

C. Rejected Alternatives

After opposing the blanket repeal of the attorney exemption, Amici now ask this Court to supply by interpretation precisely that which they could not secure by legislation.

The Commercial Law League of America and the American Bar Association, Amici herein, asked Congress to continue to exempt lawyers performing traditional legal services from the scope of the FDCPA. 131 Cong. Rec. at H10535; Leonard O. Abrams, *Testimony on Behalf of the Commercial Law League of America*, 90 Comm. L.J. 649, 650-51 (1985). Congress specifically rejected their proposal. Congressman Hiler introduced an amendment that would have limited the attorney exemption instead of repealing it, so as *not* to affect an attorney's incidental collection practice. His proposed amendment was defeated. Congressman Shumway offered an amendment to except attorneys from sections 804(1)-(3), 805(b)-(c), and 809. That amendment was defeated as well. Dissenting

Views of Rep. Hiler, H.R. Rep. No. 405, *supra* at 11, *reprinted in* 1986 U.S.C.C.A.N. at 1761.

Congress' rejection of these alternatives forecloses Attorney Heintz's argument here. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442 (1987). There is a strong presumption "against a judgment that Congress intended a result that it expressly declined to enact." *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 199 (1974). "Generally the rejection of an amendment indicates that the legislature does not intend the bill to include the provisions embodied in the rejected amendment." 2A *Sutherland Statutory Construction* § 48.18, at 369 (5th ed. 1992). Unsuccessful efforts to have an exception included in a statute indicate that the statute as passed does not include the exception. *United States v. Pfitsch*, 256 U.S. 547, 551-52 (1921) (Congress took "deliberate action in the face of opposition" and "had this question presented to its attention in a most precise form").

D. Post-enactment Statement of Rep. Annunzio

Attorney Heintz contends that the unequivocal repeal of FDCPA's exemption, for an attorney acting as an attorney, is ambiguous. Thus, he urges the Court to interpret the repeal on the basis of a post-enactment statement of Congressman Annunzio, inserted in the Congressional Record three months after the repeal as a matter of privilege, but never spoken on the floor of Congress. 132

Cong. Rec. H10031 (daily ed. Oct. 14, 1986). His comments are set forth in full in the Appendix.

"Post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage." *In re Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974). *See also Bath Iron Works Corp. v. Director, OWCP,* 113 S. Ct. 692, 700 (1993) ("[W]e give no weight to a single reference by a single Senator during floor debate in the Senate" when the text of the statute is unambiguous); *West Virginia Univ. Hosps. v. Casey*, 499 U.S. 83, 98-99 (1991) (unambiguous statute cannot be expanded or contracted even by statements of individual legislators or committees during the enactment process); *Kelly v. Robinson*, 479 U.S. 36, 51 n.13 (1986) (Court accords no significance to statements not made by members of Congress and not included in official House or Senate reports). Consequently, Congressman Annunzio's post-passage remarks may not be considered in construing the meaning of the 1986 repeal.[8]

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[8] *Green*, the only circuit court decision to conclude that attorneys engaged solely in litigation are not subject to the FDCPA, interpreted the unequivocal repeal of the attorney exemption in the supposed context of its legislative history. Yet, *Green* reached beyond the repeal and its contemporaneous legislative history to Congressman Annunzio's post-enactment statement. The opinion does not mention, and the court may not have realized, that the post-passage remarks were not made on the floor of Congress and are inconsistent with Mr. Annunzio's pre-passage remarks.

E. The FTC Staff's Enforcement Position

The Federal Trade Commission ("FTC") opposed the repeal of the attorney exemption. 131 Cong. Rec. at H10535. After Congress rejected the FTC's position, its staff adopted a policy of not applying the FDCPA to attorneys who engage solely in litigation:

> Attorneys or law firms that engage in traditional debt collection activities (sending dunning letters, making collection calls to consumers) are covered by the FDCPA, but those whose practice is limited to legal activities are not covered.

Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50097, 50100 (1988) (hereinafter "Commentary").

The FTC staff's enforcement position does not affect the FDCPA's application to attorneys. The FTC may not adopt regulations under the FDCPA. 15 U.S.C. § 1692*l*(d).[9] The FTC Staff Commentary, by its own terms, "is not binding on the Commission or the public." 53 Fed. Reg. 50101. Since the staff's enforcement position is at odds with the plain language of the FDCPA, it is entitled to no deference. *Brown v. Gardner*, 115 S. Ct. at 557. In addition, since the FTC itself may not interpret the FDCPA so as to override the blanket repeal of the attorney exemption, the pronouncements of its staff certainly do not have that effect.

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[9] *Cf. Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566-68 (1980) (regulatory interpretations entitled to deference because Truth in Lending Act provides that Federal Reserve "Board shall prescribe regulations to carry out the purposes of this subchapter." 15 U.S.C. § 1604(a)).

Indeed, circuit courts routinely reject the staff's Commentary when it deviates from the terms of the FDCPA. *E.g.*, *Fox*, 15 F.3d at 1513 ("declining to adopt the FTC's position because it conflicts with the plain language of the statute"); *Dutton*, 5 F.3d at 654 (FTC position unpersuasive since conflicts with statutory language); *Scott*, 964 F.2d at 317 ("We decline to adopt the FTC's position"); *Carroll v. Wolpoff & Abramson*, 961 F.2d 459, 461 n.4 (4th Cir. 1992) ("We find the position of the FTC unpersuasive"); *Staub v. Harris*, 626 F.2d 275, 279 (3d Cir. 1980) ("We decline to follow" informal staff letter). *Cf. Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22 (2d Cir. 1989) (rejecting FTC staff interpretation on § 1692e(11) notice); *Swanson v. Southern Or. Credit Serv., Inc.*, 869 F.2d 1222 (9th Cir. 1988) (rejecting FTC staff interpretation on § 1692g notice).

Moreover, even the Commentary does not support Attorney Heintz's position. The Commentary states only that an attorney whose practice is "limited" to legal activities is not within the definition of a "debt collector" under § 1692a(6). According to the Commentary, the legal activities of an attorney who does not simply litigate, but also otherwise meets the definition of a "debt collector" (as Attorney Heintz concedes in this Court for the first time that he generally does) are within the scope of the FDCPA for all purposes. 53 Fed. Reg. at 50102, col. 2.[10]

[10] Attorney Heintz has concisely and accurately summarized the FTC staff's position, that "attorneys must be engaged in collection activity, apart from collection litigation, to come within the definition of a debt collector." Pet. Brief at 19. However, in view of his admission that, in fact, "he does act as a debt collector" by engaging in nonlitigation activities, *id.* at 11, and in view of *Green*'s adoption of the narrow staff Commentary position, 9 F.3d at 22, there is no extant authority supporting the position that Attorney Heintz is not a debt collector on the facts presented by this case.

III. THE REPEAL DOES NOT LEAD TO ABSURD RESULTS

Attorney Heintz argues that the FDCPA should be construed to exempt attorneys engaged in litigation (even if they are otherwise debt collectors) because, he says, applying some of the provisions of the Act to litigation would be "awkward." Petitioners' Brief at 15. He claims that to subject litigation activities to the FDCPA would lead to various absurd results, such as inability to bring a legal action if the debtor demanded that collection cease. 15 U.S.C. § 1692c(c). Yet, Congressman Annunzio himself said, in the post-enactment statement on which Petitioners rely, "Suggestions that the repeal of the attorney exemption prohibits bringing legal action is an absurd reading of the act."

A. There is Nothing Absurd About Preventing an Attorney from Padding Debts

To insure that "means other than misrepresentation" are used for the collection of a debt, 15 U.S.C. § 1692(c), Congress specifically prohibited "[t]he false representation of – (A) the character, amount or legal status of any debt." 15 U.S.C. § 1692e(2). Congress also prohibited "the threat to take any action that cannot legally be taken," § 1692e(5), such as demanding unlawful interest or

charges. Apparently concerned that these prohibitions were not enough, Congress also specifically prohibited the collection of any amount which is not expressly permitted by the agreement creating the debt, § 1692f(1); the false representation of any compensation which may be lawfully received by any debt collector for collection of a debt, § 1692e(2)(B); and the use of any false or deceptive means to attempt to collect any debt. 15 U.S.C. § 1692e(10).

The FDCPA's multiple prohibition of efforts to collect excessive amounts indicates a strong congressional policy: Debt collectors cannot demand or sue for excessive charges or fees. Debt padding is one of the more frequent violations of the FDCPA, one which adversely affects consumers' pocketbooks. *E.g., Dutton v. Wolhar*, 809 F. Supp. 1130, 1140 (D. Del. 1992), *aff'd sub nom. Dutton v. Wolpoff & Abramson*, 5 F.3d 649 (3d Cir. 1993) (attorney sought costs prohibited by law); *Crossley v. Lieberman*, 868 F.2d 566, 571 (3d Cir. 1989) (attorney demanded payment of costs not incurred); *Martinez*, 1994 WL 622231 (collection agency's default judgment illegally included excess charges for taxes, attorney's fees and interest); *Strange v. Wexler*, 796 F. Supp. 1117, 1120 (N.D. Ill 1992) (attorney added attorney's fees illegally); *Cacace v. Lucas*, 775 F. Supp. 502, 505 (D. Conn. 1990) (attorney demanded more than double amount due); *Piscatelli v. Universal Adjustment Servs., Inc.*, Consumer Cred. Guide (CCH) ¶ 96,377 (D. Conn. 1985) (adding a 25% collection fee to agency's claim violated 15 U.S.C. § 1692f(1) where a state statute limited such fees to 15%); *West v. Costen*, 558 F. Supp. 564, 581-82 (W.D. Va. 1983) (unauthorized $15 charges on bad checks); *Duran v. Credit Bureau of Yuma, Inc.*, 93 F.R.D. 607

(D. Ariz. 1982) (adding illegal fee); *Wegmans Food Markets, Inc. v. Scrimpsher*, 17 B.R. 999 (Bankr. N.D.N.Y. 1982) ($5 service charge); *Johnson v. Statewide Collections, Inc.*, 778 P.2d 93 (Wyo. 1989) (demanding more than amount due); *Venes v. Professional Serv. Bureau, Inc.*, 353 N.W.2d 671, 675 (Minn. Ct. App. 1984) (collection agency added interest despite knowledge that creditor's policy precluded interest). Many unreported debt padding cases are found at National Consumer Law Center, *Fair Debt Collection*, § 5.7.3 n.388; § 5.8.2 nn.622-627 (2d ed. 1991 & Supp. 1994).

It is entirely appropriate that attorneys like Petitioners, no less than other debt collectors, should be subject to this prohibition on collecting unauthorized charges from consumers. Under Attorney Heintz's view, neither a collection agency nor an attorney could demand excessive charges outside of litigation. Yet, a collection agency suing for excessive charges would be liable under the FDCPA, but an attorney who did the same thing would not be liable. Such a result is indeed absurd; it is precisely the result that Congress sought to avoid when it deleted the attorney exemption in 1986. Lawyers should not be allowed to evade the FDCPA's restrictions.

B. The FDCPA Permits Normal Litigation Activities

The application of the FDCPA to attorneys does not interfere with their ability properly to represent their clients or collect debts through litigation. Attorney Heintz's arguments to the contrary are meritless.

First, Attorney Heintz argues that the provision which allows a consumer to notify a debt collector to cease further communications would prohibit attorneys from filing lawsuits or sending consumers court notices. Petitioners' Brief at 15. On the contrary, even if a consumer refuses to pay or makes a written demand that collection efforts cease, the FDCPA allows the collector "to notify the consumer that the debt collector or creditor may invoke specified remedies" or "intends to invoke a specified remedy." § 1692c(c)(2), (3). A "remedy" is a means of enforcing a contractual right. *Edwards v. Kearzey*, 96 U.S. 595, 600, 607 (1877). For a consumer debt, the remedy might be repossessing an item in which the creditor has a security interest, or litigation to get a judgment enforceable by a garnishment or judgment lien. The FDCPA, in § 1692c(c)(2) and (3), repeatedly recognizes that the remedy of litigation may be part of collection efforts.

Second, Attorney Heintz hypothesizes that an attorney could not communicate with a court clerk's office, since to do so purportedly would violate the prohibition against third person contacts. Since the FDCPA recognizes that litigation may ensue, and since the court clerk is not a "person" as defined, the fear is chimerical.[11] In all the years since the FDCPA was enacted, and even since

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[11] "Person" is defined in 1 U.S.C. 1 to mean "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." A governmental agency is not within the definition of person. *Cf.* the Equal Credit Opportunity Act (15 U.S.C. § 1691a(f)) and Fair Credit Reporting Act (15 U.S.C. § 1681a(b)) definitions of "person" which specifically include a governmental agency.

the attorney exemption was repealed, no one (other than Attorney Heintz or the Amici) has claimed that activity conducted in the context of normal collection litigation constitutes a "communication," as defined (§ 1692a(2)), which violates the FDCPA's prohibition on third party communications.

In addition, the FDCPA explicitly permits all communications made "with the express permission of a court of competent jurisdiction." 15 U.S.C. § 1692c(b). Permitted contacts would include contacts with process servers and deponents authorized by court rules and orders.[12]

Finally, the FDCPA does not require notices in court pleadings. A court paper is not a "communication" because of the definition of "person." A literal reading of the FDCPA does not require the statutory notices of § 1692e(11) or § 1692g in pleadings. But if there were such a requirement, inserting the notices would be simple. Indeed, if the attorney has not sent a prelitigation demand letter, it might be prudent to elicit consumer disputes by including the 30-day validation notice in the complaint, as many collection attorneys already do. 15 U.S.C. § 1692g. Providing a validation notice would not bring litigation to a halt, since an attorney is obligated to conduct a reasonable inquiry before filing the complaint. Thus, the attorney can provide the requested validation virtually by return mail.

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[12] Depositions are rare, indeed, in run-of-the-mill collection cases.

C. The FDCPA Does Not Affect Legitimate Lawsuits

Without authority for the proposition, Amicus The Commercial Law League posits that if an attorney brings a suit against a consumer and loses on any issue, the attorney would be liable for having taken an action that "cannot legally be taken." § 1692e(5). But bringing a nonfrivolous suit is not an action which "cannot legally be taken." *Cf. Hughes v. Rowe*, 449 U.S. 5, 14 (1980) ("[E]ven if the law or the facts are somewhat questionable or unfavorable at the outset of litigation, a party may have an entirely reasonable ground for bringing suit"). The difference is that between asking a court to determine a disputed issue and knowingly slipping spurious charges into a complaint in the hope that no one will notice.

An attorney is properly called to account under the FDCPA for knowingly bringing suit on claims that do not exist – such as seeking attorney's fees when there is no statutory or contractual basis for them, or, as here, suing for an amount to which the attorney knows the creditor is not entitled – in the hope that a judge or clerk entering hundreds of default judgments, or the rare consumer defending the case, will not notice.

D. The Risk of Liability Under the FDCPA Is Minimal

Conscientious attorney debt collectors who perform their duties in conformity with the ethical obligations of the profession and prevailing standards of reasonable

and adequate inquiry into the facts and law of the case, have no legitimate reason to complain of the 1986 amendment and the FDCPA's application to their litigation activities. Indeed, the risk of liability under the FDCPA has the desired effect of making attorneys adhere to their ethical obligations to review each file for the validity of the claim before suit. *E.g., United States v. Central Adj. Bureau, Inc.*, 667 F. Supp. 370, 380 (N.D. Tex. 1986), *aff'd*, 823 F.2d 880 (5th Cir. 1987) (attorney must review the file to determine the merits of the claim). To use *Green* as an example, if Attorney Hocking made an honest mistake, he could have limited his FDCPA exposure readily by simply admitting the violation, and providing an explanation. This prudent course undoubtedly would have reduced or eliminated statutory damages (there is no guaranteed minimum) and forestalled accrual of private attorney general fees.[13] If his client misstated the amount due and his office had reasonable procedures to catch such errors, he would have no liability, at least for the first such error.[14]

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[13] *Cf. Crossley v. Lieberman*, 868 F.2d 566 (3d Cir. 1989) (award increased from $100 to $1,000 because vigorous defense indicated intent to continue course of conduct).

[14] Section 1692k(c) provides: "A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." *See Fox*, 15 F.3d at 1514. The seminal "bona fide error" case under a parallel provision of the Truth in Lending Act, 15 U.S.C. § 1640(c), is *Mirabal v. General Motors Acceptance Corp.*, 537 F.2d 871 (7th Cir. 1976).

E. Common Law Immunities Do Not Apply

Attorney Heintz also argues that the FDCPA should be construed to incorporate state common law doctrines providing attorneys with an absolute privilege that protects them from liability for defamatory statements made in connection with litigation.[15] Petitioners' Brief at 17. This argument fails for two reasons.

First, an FDCPA action is not a defamation action. Common law privilege doctrines do not provide attorneys with immunity from *any* liability for conduct related to litigation. *See Tower v. Glover*, 467 U.S. 914, 922 (1984) (common law immunity for defamatory statements made in judicial proceedings would not cover conspiracy to secure conviction). Here, Ms. Jenkins' complaint alleges that Attorney Heintz engaged in a practice which is explicitly prohibited by several sections of the FDCPA when he demanded that the consumer pay unauthorized charges. Nothing in the common law provides that attorneys may engage in debt padding with impunity as long as their conduct is related to litigation.

Second, the FDCPA does not incorporate state common law immunities. The FDCPA has its source in the Federal Trade Commission Act, 15 U.S.C. § 45, which this

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[15] The state common law of privilege applies to parties and witnesses, as well as to lawyers. Restatement (Second) Torts § 587 (1965). Like some of the arguments made by Amicus The Commercial Law League, the privilege argument represents a disagreement with congressional policy decisions applicable to lay debt collectors as well as lawyers. Ms. Jenkins does not address other arguments which are not peculiar to the FDCPA's application to litigation.

Court has recognized is not tied to common law standards. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 240, 243 (1972). There is no indication that, in creating a *federal* remedy for improper debt collection practices, Congress intended to incorporate *state* law immunities. Rather, the FDCPA contains its own immunities, § 1692a(6), and its own defenses to liability. § 1692k(c),(e). The Act further provides that inconsistent state laws are preempted, but state laws that provide greater protection to consumers are not affected. § 1692n. Because Congress explicitly addressed the FDCPA's relationship to state law, and adopted defenses and immunities without any suggestion that state common law immunities should also be incorporated, Attorney Heintz's argument must fail.

IV. ATTORNEY MISCONDUCT IN LITIGATION IS NECESSARILY WITHIN THE FDCPA

Since the 1986 repeal of the attorney exemption, none of the extreme examples conjured up by Attorney Heintz or the Amici has occurred. Case law properly holds attorneys liable for FDCPA violations in the context of legal activities, ranging from prelitigation demands, to litigation, to postlitigation efforts to enforce a judgment. *Frey v. Gangwish*, 970 F.2d 1516 (6th Cir. 1992) (postjudgment collection letter); *Scott v. Jones*, 964 F.2d 314 (4th Cir. 1992) (filing suit in wrong venue); *Carroll v. Wolpoff & Abramson*, 961 F.2d 459 (4th Cir.), *cert. denied*, 113 S. Ct. 298 (1992) (prelitigation collection letter); *Graziano v. Harrison*, 950 F.2d 107 (3d Cir. 1991) (prelitigation collection letter); *Crossley v. Lieberman*, 868 F.2d 566 (3d Cir. 1989) (prelitigation collection letter); *Tolentino v. Friedman*, 833 F. Supp. 697 (N.D. Ill. 1993) (mailing "important notice" with copy

of filed court papers); *Sluys v. Hand*, 831 F. Supp. 321 (S.D.N.Y. 1993) (prelitigation collection letter); *Cortright v. Thompson*, 812 F. Supp. 772 (N.D. Ill. 1992) (prelitigation collection letter); *Strange v. Wexler*, 796 F. Supp. 1117 (N.D. Ill. 1992) (filing complaint seeking attorney's fees which were not available; FDCPA gives attorney incentive to "pay more attention to the complaints he files" or "dissuade[s] him from taking advantage of debtors who do not know their rights"); *Stojanovski v. Strobl & Manoogian, P.C.*, 783 F. Supp. 319 (E.D. Mich. 1992) (prelitigation collection letter); *Cacace v. Lucas*, 775 F. Supp. 502 (D. Conn. 1990) (prelitigation collection letter demanding over twice the amount of the debt); *Shapiro & Meinhold v. Zartman*, 823 P.2d 120 (Colo. 1992) (filing foreclosure actions in wrong venue); *Clark's Jewelers v. Humble*, 823 P.2d 818 (Kan. App. 1991) (letter to debtor care of attorney).

Attorney misconduct is more serious than collection agency misconduct. Indeed, the collection agency's most effective threat is to invoke an attorney in the collection process. *Bentley v. Great Lakes Collection Bureau, Inc.*, 6 F.3d 60 (2d Cir. 1993); *Clomon v. Jackson*, 988 F.2d 1314 (2d Cir. 1993); *United States v. National Fin. Servs., Inc.*, 820 F. Supp. 228 (D. Md. 1993); *Masuda v. Thomas Richards & Co.*, 759 F. Supp. 1456 (C.D. Cal. 1991).

Consumer debtors, ordinarily unrepresented because of their financial circumstances or the cost of legal representation, are usually ignorant of their legal rights. They are defenseless when an attorney overreaches while using the power of the judicial system against them. Indeed, as

our complaint alleges, most consumers default. *See generally* Hillard M. Sterling & Philip G. Schrag, *Default Judgments Against Consumers: Has the System Failed?*, 67 Denver U.L. Rev. 357 (1990) (study of 15 defaulted defendants; only 3 had no possible defenses or counterclaims); David Caplovitz, *Consumers in Trouble: A Study of Debtors in Default* 191-224 (1974) (consumers who have defenses may not be effectively asserting them; see especially discussion at 219 n.29 and 223); Charles E. Clark, *Research in Law Administration*, 2 Conn. B.J. 211, 213 (1928) (of 2713 contract and foreclosure cases filed, 2511 were withdrawn, discontinued, defaulted or stipulated to judgment).

Lawyers can readily take advantage of defaulting consumers; a busy court system cannot interpose defenses for the unrepresented consumer. *Cf. Gordon v. Tufano*, 450 A.2d 852 (Conn. 1982) (court has no jurisdiction to raise usury issue if parties do not). Congress intended the FDCPA to have a prophylactic effect by encouraging private attorneys general to bring some balance to a one-sided situation.

> Aside from the possibility of suit under the [FDCPA], Wexler [an attorney] may have believed it was not in his interest to examine his cases carefully to determine whether he was entitled to attorney's fees from the debtor. A defendant debtor appearing in court without an attorney would be unlikely to know he was not liable for fees and the judge might not catch Wexler's overreaching; if the defendant defaulted, the judgment would probably include the fees.

> One purpose of statutory damages is to create an incentive to obey the law. It appears Wexler needs an incentive either to pay more attention to the complaints he files, or, taking another view, to dissuade him from taking advantage of debtors who do not know their rights.

Strange, 796 F. Supp. at 1120.

In repealing the attorney exemption, Congress expressly found "that current law does not adequately protect consumers from attorney debt collection abuses," H.R. Rep. No. 405, *supra*, at 7, *reprinted in* 1986 U.S.C.C.A.N. at 1758. Thus, Congress has already rejected the argument that Rule 11-type sanctions provide an adequate deterrent. In addition, as recently amended, Rule 11 provides virtually no deterrent at all in the context of consumer debt collection litigation. In the rare case when a consumer notices intentional debt padding, the attorney can simply withdraw the claim. Fed. R. Civ. P. 11(c). Debt padding is risk free, unless the FDCPA applies.

> Baseless filing puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay. Even if the careless litigant quickly dismisses the action, the harm triggering Rule 11's concerns has already occurred. Therefore, a litigant who violates Rule 11 merits sanctions even after a dismissal. Moreover, the imposition of such sanctions on abusive litigants is useful to deter such misconduct. If a litigant could purge his violation of Rule 11 merely by taking a dismissal, he would lose all incentive to "stop, think and investigate more carefully before serving and filing papers." (Citation omitted.)

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 398 (1990). Rule 11 sanctions are easily evaded.[16] The FDCPA is the only effective mechanism to deter such violations as the debt padding which occurred in this case. Most consumers default; in such cases there is no one to invoke Rule 11 sanctions or counter attorneys' overreaching. In any event, court rules do not substitute for or take precedence over Congress' decision to apply FDCPA liability to attorneys collecting consumer debts.

Ms. Jenkins submits that the limited remedies of § 1692k – actual damages (which may be difficult to prove, unless overcharges have been paid, *Baker*, 677 F.2d at 780-81), statutory damages up to $1,000, plus attorney's fees – are minimally necessary to better balance the scales of justice in the normally one-sided advantage an attorney has when suing a lay debtor. Apart from Ms. Jenkins' view, Congress has made that very determination. The arguments now advanced in opposition have no place in this forum in view of the contrary legislative judgment.

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[16] Contrary to Petitioner's Brief at 20, Connecticut does not have a Rule 11 parallel. *Fattibene v. Kealey*, 558 A.2d 677 (Conn. App. 1989). Connecticut's Unfair Trade Practices Act cannot be used against an opposing attorney. *Jackson v. R.G. Whipple, Inc.*, 627 A.2d 374 (Conn. 1993). There is no cause of action for abuse of process. *Heck v. Humphrey*, 114 S. Ct. 2364, 2372 n.5 (1994) ("The gravamen of that tort is not the wrongfulness of the prosecution, but some extortionate perversion of lawfully initiated process to illegitimate ends"). A favorable result, even in a lesser amount than requested, negates malicious prosecution as a remedy. *Id.*

CONCLUSION

Ms. Jenkins respectfully requests that this Court affirm the decision below.

Respectfully submitted,

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Dated: January 17, 1995

STATEMENT OF REP. ANNUNZIO, 132 Cong. Rec. H10031 (daily ed. Oct. 14, 1986)

(typeface indicates "words inserted or appended, rather than spoken." *Id.* at H9943)

Mr. Annunzio. Mr. Speaker, on July 9, legislation repealing the attorney exemption to the Fair Debt Collection Practices Act became law. That legislation, which I introduced, requires that attorneys in the debt collection business comply with the law that protects consumers against abusive, deceptive, and unfair debt collection practices. The legislation was a direct response to the explosive growth in the number of law firms that had entered the debt collection business and were abusing the exemption the original Fair Debt Collection Practices Act provided. With the repeal of the exemption, attorneys in the debt collection business must comply with the act when they collect consumer debts.

The proliferation of attorney collectors has grown dramatically over the past several years, and an estimated 5,000 attorneys are now involved in debt collection. Repeal of the exemption was intended to place attorney collectors and lay collectors on an equal footing. It ensures that attorneys use fair debt collection tactics. It ensures that lay collectors, who are required by the act to refrain from using abusive tactics, are not competitively disadvantaged by the act.

Ethical attorneys need have no concerns about the impact of the act on their practice. The Fair Debt Collection Practices Act regulates debt collection, not the practice of law. Congress repealed the attorney exemption to the act,

not because of attorney's conduct in the courtroom, but because of their conduct in the backroom. Only collection activities, not legal activities, are covered by the act.

Not all attorneys are covered by the act. It does not apply to the collection of commercial debts. It applies only to those attorneys whose business has the principal purpose of the collection of debts or who regularly collect or attempt to collect dues to third parties. Attorneys, like any other persons who only irregularly or occasionally collect debts, are not covered.

Some attorneys have claimed that the act will restrict their ability to practice law. Nothing could be further from the truth. The Act applies to attorneys when they are collecting debts, not when they are performing tasks of a legal nature.

Suggestions that the repeal of the attorney exemption prohibits bringing legal action is an absurd reading of the act. The act only regulates the conduct of debt collectors, it does not prevent creditors, through their attorneys, from pursuing any legal remedies available to them.

Actions which can only be taken by those possessing a license to practice law are outside the scope of the act. The filing of a complaint is not covered by the act. Since it is not covered under the act, there is no requirement that attorneys include the notices required under section 809 of the act in legal filings. Further, there is no requirement that the attorney must provide verification of the debt as required under that section of the act in the context of legal proceedings. Since the attorney will be required to prove the validity of the debt as an element of the legal

proceedings, there is no need to require additional validation.

Repeal of the attorney exemption does not infringe upon the practice of law by attorneys. It does assure that consumers are protected from unfair and unethical debt collection practices, regardless of the profession of the collector.
